IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

MACON COUNTY INVESTMENTS, INC.; REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

SHERIFF DAVID WARREN'S REPLY TO PLAINTIFFS' RESPONSE TO SHERIFF WARRENS' MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Sheriff David Warren ("Sheriff Warren"), who has been sued in his official capacity as Sheriff of Macon County, Alabama, and files this reply to Plaintiffs' Response In Opposition to Sheriff Warren's Motion for Summary Judgment (Doc. 72) as follows:

I. PLAINTIFFS HAVE MISSTATED THE STANDARD OF REVIEW IN THEIR RESPONSE BRIEF TO THIS COURT.

Plaintiffs misstated the standard for granting summary judgment in their brief to this Court on June 1, 2007 (Doc. 62) and Plaintiffs once again cite to the wrong standard In their Response to Sheriff Warren's Motion for Summary Judgment (Doc. 72). Plaintiffs argue that "[a]t this stage, the Plaintiffs need only allege the differential treatment." (Plaintiffs' Response at pg. 4.) Plaintiffs also argue that "[w]hen the liberal standards of pleading are applied, these allegations [that the Sheriff's rules and regulations are irrational and arbitrary] are sufficient to survive a Motion to Dismiss." (Plaintiffs' Response at pg. 4.) In support of this proposition, Plaintiffs rely on a 1997 unreported case out of the Middle District of Florida, APT Tampa/Orlando v. Orange County and the Bd. Of Comm'ns, 1997 WL 33320573 (M.D. Fla. Dec. 10, 1997).

The Federal Rules of Civil Procedure and caselaw indicate otherwise. In fact, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Indeed, "there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir.1990); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted) holding that (if the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted"); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, (1986)(stating that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

Plaintiffs concede that they have failed to meet their burden in opposition to Sheriff Warren's summary judgment motion: "[u]pon development of the record through discovery, the Plaintiffs will show that there are similarly situated individuals/entities that received different treatment, namely the current and Class B Bingo Licensed facility in Macon County." (Plaintiffs' Response at pg. 4). The Plaintiffs may not rest upon these mere allegations at this stage. Moreover, the time for discovery has passed in this case. The Court set the discovery deadline for May 1, 2007, exactly one month before the Sheriff (and the Plaintiffs themselves) filed for summary judgment. Therefore, since Plaintiffs have offered this Court nothing more than mere allegations and promises to develop a record in the future which they cannot fulfill, Plaintiffs have not and cannot meet their burden. Accordingly, Sheriff Warren's motion for summary judgment is due to be granted.

II. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF ESTABLISHING STANDING AT THIS STAGE OF THE LITIGATION.

Plaintiffs incorrectly argue that this Court has conclusively decided the issue of standing and that Macon County Investments, Inc. ("MCII") cured any defects in standing by amending its Complaint and alleging that it was also an applicant for a Class B Bingo License. (Plaintiffs' Response at pg. 1). The Court denied Sheriff Warren's motion to dismiss MCII for lack of standing in its Order dated January 17, 2007 (Doc. 44.). However, a federal court bears a continuing burden to inquire into whether a plaintiff has standing at every stage of the litigation and may raise the issue *sua sponte* even when the parties do not raise it. "Federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." Florida Public Interest Research Group Citizen Lobby, Inc. v. E.P.A., 386 F.3d 1070, 1083 (11th Cir.2004). Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1542 (11th Cir.1993) (stating that "Longstanding principles of federal law oblige us to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction."). The amount of proof necessary to establish standing also varies with the stage of the litigation. In other words, while this Court may have correctly decided that the general factual allegations in Plaintiffs' complaint were sufficient to survive Sheriff Warren's motion to dismiss, the Plaintiffs cannot rest upon those allegations at the summary judgment stage:

> The party invoking federal jurisdiction bears the burden of establishing these elements [of Article III standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. **In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.**

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)(emphasis added)(internal citations omitted)(internal quotations omitted). Thus, while this Court had to rely upon the Plaintiffs's general allegations in their Complaint as true at the motion to dismiss stage, the Court is not bound by those erroneous allegations at the summary judgment stage. Instead, this Court must evaluate the Plaintiffs' standing in light of the facts which Sheriff Warren presented to this Court in his Motion for Summary Judgment which prove that the Plaintiffs lack standing and which the Plaintiffs have not challenged.

CONCLUSION

For the reasons set forth hereinabove, Sheriff Warren is entitled to summary judgment as a matter of law as to all claims asserted against him in this action and said claims are due to be dismissed with prejudice.

Respectfully submitted,

/s/Fred D. Gray, Jr.
One of the Attorneys for Defendant,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following by placing a copy of the same in the United States Mail, with proper postage prepaid, on this the 28th day of June 2007:

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